

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

SAMSUNG ELECTRONICS CO., LTD.	)	
AND SAMSUNG SEMICONDUCTOR, INC.,	)	
	)	
Plaintiffs and Counter-Defendants,	)	
	)	
v.	)	C.A. No. 21-1453-RGA-JLH
	)	
NETLIST, INC.,	)	
	)	
Defendant and Counter-Plaintiff.	)	
<hr/>		
NETLIST, INC.,	)	
	)	
Counter-Plaintiff,	)	
	)	
v.	)	
	)	
GOOGLE LLC AND ALPHABET INC.,	)	
	)	
Counter-Defendants.	)	
<hr/>		

**NETLIST, INC.'S OBJECTIONS TO REPORT AND RECOMMENDATION  
REGARDING COUNTER-DEFENDANTS' MOTION TO DISMISS GOOGLE AND  
ALPHABET, OR ALTERNATIVELY, SEVERAL AND STAY AND DISMISS  
WILLFULNESS AND INDIRECT INFRINGEMENT ALLEGATIONS (D.I. 161)**

OF COUNSEL:

Jason Sheasby  
H. Annita Zhong  
Thomas C. Werner  
Michael Tezyan  
Andrew J. Strabone  
Yanan Zhao  
IRELL & MANELLA LLP  
1800 Avenue of the Stars, Suite 900  
Los Angeles, CA 90067  
(310) 277-1010

Rebecca Carson

Karen E. Keller (No. 4489)  
Emily S. DiBenedetto (No. 6779)  
SHAW KELLER LLP  
I.M. Pei Building  
1105 North Market Street, 12th Floor  
Wilmington, DE 19801  
(302) 298-0700  
kkeller@shawkeller.com  
edibenedetto@shawkeller.com  
*Attorneys for Netlist, Inc.*

Jonathan M. Lindsay  
IRELL & MANELLA LLP  
840 Newport Center Drive, Suite 400  
Newport Beach, CA 92660  
(949) 760-0991

Dated: September 1, 2023

Pursuant to Federal Rule of Civil Procedure 72(b)(2) and Local Rules 7.1.5(b) and 72.1, Counterclaim Plaintiff Netlist, Inc. (“Netlist”) respectfully objects to the following findings in the Report and Recommendation (D.I. 161, “R&R”) on Counterclaim Defendants’ Motion to Dismiss (D.I. 63 “Motion”).

### **STANDARD OF REVIEW**

“The district judge must determine *de novo* any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). “The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” *Id.*

### **OBJECTIONS**

#### **I. Netlist Has Properly Pleaded Indirect Infringement Claims against Google and Alphabet**

Liability for induced infringement under 35 U.S.C. § 271(b) requires a showing that a defendant knew that another party’s acts constituted infringement and intended that other party to infringe. *In re Bill of Lading Transmission & Processing Sys. Pat. Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012) (superseded on other grounds). As an initial matter, as the R&R recognizes, the Second Amended Answer and Counterclaims (“SAAC”) plausibly alleges the Google Counter-Defendants pre-suit knowledge of the Asserted Patents.

The complaint identifies that Google and Alphabet “provide[] an expansive range of services,” and that they use memory components in their provision of those services. D.I. 58 at 51. Netlist then explains, for each asserted patent, that the Google Counter-Defendants induce and contribute to infringement by others, such as Google and Alphabet customers and end users, through their acts of making, selling, offering to sell, distributing, or otherwise making available the Accused Instrumentalities and materially similar products and services. *See id.* at ¶¶ 76-77,

87, 97-98. These allegations explain that customers and end users of Google's and Alphabet's products and services infringe by using those products, that the Google Counter-Defendants had knowledge of the Asserted Patents, and that the Google Counter-Defendants "actively and knowingly aid[] and abet[] [those acts of] direct infringement" by providing instruction on how to use those infringing products and services. *C.R. Bard, Inc. v. Advanced Cardiovascular Sys., Inc.*, 911 F.2d 670, 675 (Fed. Cir. 1990).

Similarly, Netlist has adequately pled contributory infringement. *See* 35 U.S.C. § 271(c). Contrary to the Google Counter-Defendants' assertions, Netlist has pled facts showing that Google was aware of the Asserted Patents and the fact that Samsung infringed them by the filing date of Samsung's declaratory judgment complaint. Netlist has also alleged that the accused memory modules have no substantial non-infringing use and are a material part of the patented invention. *See* D.I. 58, ¶¶ 57, 77, 96.

The R&R does not fully evaluate these allegations but rather faults Netlist for not identifying specific users that the Google Counter-Defendants are causing to infringe. That level of specificity is not required under Rule 8, and the R&R does not indicate why it has applied a higher pleading standard in this case. *See* R&R at 14 ("In some cases, depending on the nature of the patent claim and the accused product, a boilerplate allegation of indirect infringement is sufficient to put the defendants on notice of what activity is being accused of infringement. In this case, it's not.").

### **CONCLUSION**

For the foregoing reasons, Netlist respectfully requests that the Court reject the R&R's findings as to Netlist's indirect infringement claims.

OF COUNSEL:

Jason Sheasby  
H. Annita Zhong  
Thomas C. Werner  
Michael Tezyan  
Andrew J. Strabone  
Yanan Zhao  
IRELL & MANELLA LLP  
1800 Avenue of the Stars, Suite 900  
Los Angeles, CA 90067  
(310) 277-1010

Rebecca Carson  
Jonathan M. Lindsay  
IRELL & MANELLA LLP  
840 Newport Center Drive, Suite 400  
Newport Beach, CA 92660  
(949) 760-0991

Dated: September 1, 2023

/s/ Emily S. DiBenedetto

Karen E. Keller (No. 4489)  
Emily S. DiBenedetto (No. 6779)  
SHAW KELLER LLP  
I.M. Pei Building  
1105 North Market Street, 12th Floor  
Wilmington, DE 19801  
(302) 298-0700  
kkeller@shawkeller.com  
edibenedetto@shawkeller.com  
*Attorneys for Netlist, Inc.*

**CERTIFICATE REGARDING NEW ARGUMENTS**

Pursuant to the Court's March 7, 2022 Standing Order for Objections Filed Under Fed. R. Civ. P. 72, Netlist, Inc. hereby certifies that the foregoing objections do not raise any new legal or factual arguments.

OF COUNSEL:

Jason Sheasby  
H. Annita Zhong  
Thomas C. Werner  
Michael Tezyan  
Andrew J. Strabone  
Yanan Zhao  
IRELL & MANELLA LLP  
1800 Avenue of the Stars, Suite 900  
Los Angeles, CA 90067  
(310) 277-1010

Rebecca Carson  
Jonathan M. Lindsay  
IRELL & MANELLA LLP  
840 Newport Center Drive, Suite 400  
Newport Beach, CA 92660  
(949) 760-0991

Dated: September 1, 2023

/s/ Emily S. DiBenedetto  
Karen E. Keller (No. 4489)  
Emily S. DiBenedetto (No. 6779)  
SHAW KELLER LLP  
I.M. Pei Building  
1105 North Market Street, 12th Floor  
Wilmington, DE 19801  
(302) 298-0700  
kkeller@shawkeller.com  
edibenedetto@shawkeller.com  
*Attorneys for Netlist, Inc.*